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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 428

EL DORADO OIL COMPANY AND EL DORADO TERMINAL COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION CORPORATION, THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATEMENT AS TO JURISDICTION

In compliance with Paragraph 1 of Rule 12 of the Rules of the Supreme Court of the United States, El Dorado Oil Works and El Dorado Terminal Company submit herewith their statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause:

A. The statutory provisions believed to sustain that jurisdiction are Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, par. (4);

U. S. C., Title 28, Sec. 345), and Section 210 of the Judicial Code (38 Stat. 220, 28 U. S. C. 47a) and, particularly, the following provision thereof:

> "A final judgment or decree of the District Court in the cases specified in Section 44 of this Title may be reviewed by the Supreme Court of the United States if an appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases . . . ."

B. The Statutes of the United States, a construction of which is involved herein, are:

(1) The Act of October 22, 1913, c. 32, 38 Stat. 219 (28 U. S. C. 41, subd. (28), 43, 45), containing the following provisions vesting jurisdiction in the District Court to set aside and annul orders of the Interstate Commerce Commission and defining the venue of such Court:

> "*Setting aside order of Interstate Commerce Commission.* Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

(2) The Act of October 22, 1913, c. 32, 38 Stat. 220, and Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. 44) defining the practice and procedure in such cases.

(3) The Act of March 3, 1911, c. 231, Sec. 208, 36 Stat. 1149 (Judicial Code Sec. 208, 28 U. S. C. 46).

C. The decree sought to be reviewed was entered on April 9, 1945, and the petition for appeal was presented to the District Court on June 1, 1945.

D. This action was brought by appellants (Plaintiffs below) before a three judge court, pursuant to the Urgent

Deficiencies Act (38 Stat. 219; 28 U. S. C. Secs. 41 (28) and 43-46, inclusive) to set aside, annul or suspend an order of the Interstate Commerce Commission issued April 10, 1944, in a proceeding entitled *Allowances for Privately Owned Tank Cars* and numbered 28515 in the files of the Interstate Commerce Commission (hereinafter called Commission).

The Commission, The General American Transportation Corporation and some eighty-eight (88) railroads intervened in the action, filing answers opposing the complaint of appellants.

The El Dorado Oil Works, appellant, is engaged in extracting coconut oil from copra in plants at Berkeley and Oakland, California. On September 28, 1933, El Dorado Oil Works entered into an agreement with General American Tank Car Corporation, predecessor of respondent, General American Transportation Corporation (herginafter called the Car Company), under which the Car Company leased to the El Dorado Oil Works 50 tank cars at a monthly rental of $27.50 per car. The Oil Works also agreed to take and the Car Company further agreed to supply the Oil Works with such additional tank cars as it might need at a monthly rental of $30.00 per car.

The agreement required the Car Company to collect all mileage earned under applicable railroad tariffs by the cars covered by the agreement and each month to credit to the rental or service account of El Dorado Oil Works all mileage earned by said cars while in the service of the Oil Works.

The cars were used by the El Dorado Oil Works for the transportation of its shipments of coconut oil in interstate commerce from Berkeley, California, principally to eastern points.

The tariffs of the carriers, though publishing a general provision for the payment of 1½ cents per car per mile, both loaded and empty, for the use of tank cars of private ownership, provided for the payment of mileage only to the

party whose reporting marks appeared on the cars and for a portion of the period covered by the car lease agreement stipulated that no payment would be so made to car lessees.

Up to July, 1934, the Car Company, pursuant to said agreement, collected the mileage allowances of 1½ cents per car mile set forth in the carriers' tariffs and paid them to the Oil Works. From that time on the Car Company refused to pay to the Oil Works any part of the said mileage allowances in excess of the monthly rental reserved in the agreement although the Car Company continued to receive the full mileage allowances from the carriers.

In June, 1935, the El Dorado Terminal Company, as assignee of its parent company, the El Dorado Oil Works, brought suit against the Car Company in the United States District Court for the Northern District of California, Southern Division, to recover the unpaid mileage earnings accrued from the use by the Oil Works of the leased cars up to May 31, 1935. These earnings amounted to $23,540.79 and had been collected by and retained by the Car Company. The Car Company denied liability on the ground that payment by it of mileage received in excess of the car rental paid by the Oil Works would constitute a rebate from published transportation rates in violation of the Elkins Act (49 U. S. C. 41). Judgment for the Car Company was rendered by the District Court, but was reversed on appeal by the Circuit Court of Appeals (104 Fed. (2d) 903). The Supreme Court granted certiorari and in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, held that an administrative question within the jurisdiction of the Commission being involved, the District Court should have stayed its hand pending the Commission's determination of the administrative question.

The Oil Works and the Terminal Company thereafter petitioned the Commission to cause an investigation to be

made of the questions involved and the practices disclosed by said action in the District Court. By order, dated July 24, 1940, the Commission instituted an investigation upon its own motion to determine:

> (1) Whether the practices involved under the terms and operations of the lease contract are unlawful in violation of the Interstate Commerce Act;
>
> (2) Whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid, by the carrier or carriers by railroads for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce from Berkeley and Oakland, Calif., in the period January 1, 1934, to December 31, 1936; and
>
> (3) What findings shall be made, or what rules, regulations or practices shall be prescribed, or what orders shall be entered to remove any unlawfulness that may be found to exist.

The Commission thereafter made a determination to the effect that any allowances by the Tank Car Company to the Oil Works pursuant to the said agreement in excess of such car rentals were unjust and unreasonable and constituted an unlawful preference or rebate to the Oil Works as a shipper, contrary to the Elkins Act. After making the said determination, the Commission discontinued the proceeding by an order dated April 10, 1944.

Thereafter and in due time plaintiffs filed with the Commission an application for rehearing, re-argument and reconsideration of the matters covered by the said order of the Commission and particularly averred that the said order was incomplete, inadequate and erroneous that it was contrary to the evidence and unsupported by any evidence; that said order constituted an usurpation of the province

of the District Court in excess of the jurisdiction and authority of the Commission; also that the Commission had failed in said order to make findings on a material question as to what is a reasonable and uniform allowance to be made by Interstate Carriers to the furnishers of tank cars as a class as provided in Section 15 (13) of the Interstate Commerce Act; that its conclusions were not supported by findings of fact and that erroneous principles of law were applied by the Commission in its decisions and order. The said application for rehearing, re-argument and reconsideration was denied by order of the Commission on July 31, 1944.

E. The questions presented are substantial and of great importance. The decision of the three judge court in this case sanctions the exercise by the Commission of judicial powers vested in the District Court in respect of a civil action pending in the District Court and of which action said court had complete jurisdiction. (*General American Tank Car Corp.* v. *El Dorado*, 308 U. S. 422.) The public interest and the express provisions of the Act of October 22, 1913, c. 32, 38 Stat. 219 (28 U. S. C. 41, Subd. 28) require a determination of the scope of judicial review of an order of the Commission deemed "quasi-judicial" in character that by its terms discontinues a proceeding and in effect divests the District Court of its authority to determine a civil action pending before it.

There is also involved the scope of the authority of the Commission under Section 15 (13) of the Interstate Commerce Act (49 U. S. C. A.) to determine the compensation payable to shippers furnishing services or instrumentalities to carriers. The order of the Commission challenged in the three judge court purported to decide that payment by the Tank Car Company to the Oil Works in accordance with its agreement would amount to a rebate or discrimination prohibited by the Elkins Act. This was an unlawful usurpation

by the Commission of the legal authority of the District Court in the disposition of the action of which the Supreme Court in the decision of *General American Tank Car Corp.* v. *El Dorado*, 308 U. S. 422, had held that the District Court had complete and adequate jurisdiction.

The authority of the Commission under Section 15 (13) of the Interstate Commerce Act (49 U. S. C. A.) is limited to the fixing of a just and reasonable charge to be paid to the person furnishing the service or facility. The allowance so ascertained must be disclosed by the published tariffs and must be uniform. The Commission, however, refused to determine what would be a just and reasonable allowance with uniform application by stating "we cannot tell how far reaching the investigation would have to be."

The Commission failed, and in fact refused, to make a proper investigation under Section 15 (13) of the Interstate Commerce Act (49 U. S. C. A.). This breach of duty was coupled with an unlawful exercise of authority by the Commission in its attempt to decide the issue raised in the pending District Court action, that payment by the Tank Car Company to the Oil Works in accordance with the agreement would amount to a rebate or discrimination prohibited by the Elkins Act.

The question is substantial and it is of great public importance that an early determination be made of the proper scope of the Commission's application of Section 15 (13) of the Interstate Commerce Act.

The order of the Commission, if permitted to stand, would render the carriers unable to establish and publish a uniform allowance as contemplated by said Section 15 (13). The carriers also, if required to pay variable rentals would be forced to violate Section 2 of the Interstate Commerce Act which defines and prohibits unjust discrimination in respect of transportation charges. The order of the Commission has introduced considerable confusion in the field

of allowances by carriers for privately furnished services or facilities and requires an authoritative determination by the Supreme Court.

By its sanction of the payment by carriers to a car-owning company of the published mileage allowance although the cars in question were furnished by the lessee of the cars; and by its approval of such payments to the car-owning company instead of the car lessee the Commission in effect directly violated the provisions of Section 15 (13) of the Interstate Commerce Act in two respects: First by approving payment by the carriers to a person who had not furnished the service and, Second, by authorizing such payments in excess of the car rental which in the same order the Commission held to be the maximum allowance to be so paid. In prohibiting or disallowing any compensation in excess of car rentals to a shipper-lessee the Commission has in effect required the carriers to determine by their own media the amount paid or payable by the shipper-lessee for each tank car furnished the carriers for transportation purposes—which not only burdens the carriers but opens the door for the preferences and discrimination prohibited by the Interstate Commerce Act.

There is further involved the power of the Commission to make findings unsupported by any evidence and resting solely on a prior decision of the Commission in an entirely different proceeding. The Commission's conclusion, that an allowance to the Oil Works by the rail carriers or by the Tank Car Company under the agreement in excess of the car rentals would be unjust and unreasonable and would unduly prefer the Oil Works as a shipper of its commodities, was entirely without support in the evidence and was arbitrary.

The profit so realized was not a rebate or otherwise contrary to the provisions of the Elkins Act because the evidence shows without conflict that on all of the shipments

the carriers had received the full freight to which they were entitled under the applicable tariffs. The uncontradicted evidence showed that plaintiffs had not paid the freight, which was paid by consignees. Hence no rebate in freight could have been received by the Oil Works. The only support for this conclusion of the Commission is its decision in the *Refrigerator Car Case*, 201 I. C. C. 323. A finding without evidence or contrary to the evidence is arbitrary and baseless. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88.

It is important and of great public interest that the Supreme Court determine the standards of evidence required in a proceeding before the Commission and the power of the Commission to make findings and conclusions supported only by its own decision in an unrelated proceeding.

F. The following decisions sustain the jurisdiction of the Supreme Court to entertain an appeal in this case:

St. Louis & O'Fallon R. Co. v. *U. S.*, 279 U. S. 461, 73 L. Ed. 798.

Rochester Telephone Co. v. *U. S.*, 307 U. S. 125, 83 L. Ed. 1147.

Columbia Broadcasting Company v. *U. S.*, 316 U. S. 407, 86 L. Ed. 1563.

Eastern Central, etc., v. *U. S.*, 321 U. S. 194, 88 L. Ed. 668.

American Federation of Labor v. *National Labor Relations Board*, 308 U. S. 401, 84 L. Ed. 347.

Respectfully submitted,

W. F. Williamson,
Williamson & Wallace,
310 Sansome Street,
San Francisco 4, California,
Counsel for Appellants.

APPENDIX "A"

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Civil Action No. 23619-G

EL DORADO OIL WORKS, a Corporation, and EL DORADO TERMINAL COMPANY, a Corporation, *Plaintiff*,

vs.

UNITED STATES OF AMERICA, *Defendant*,

and

INTERSTATE COMMERCE COMMISSION, *Intervening Defendant*

Order Dismissing Action

Ordered:

1. The above entitled action is hereby dismissed with costs to defendant and intervenors.

2. Counsel for defendant may submit Findings of Fact and conclusions of law in conformity with Rule 52-A F. R. C. P.

Opinion filed.

Dated: March 6th, 1945.

CURTIS D. WILBUR,
United States Circuit Judge.
LOUIS E. GOODMAN,
United States District Judge.
A. F. ST. SURE,
United States District Judge.

(Endorsed:) Filed Mar. 7, 1945. C. W. Calbreath, Clerk.

APPENDIX "B"

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Civil Action No. 23619-G

EL DORADO OIL WORKS, a Corporation, and EL DORADO TERMINAL COMPANY, a Corporation, *Plaintiffs*,

vs.

UNITED STATES OF AMERICA, *Defendant*,

and

INTERSTATE COMMERCE COMMISSION, *Intervening Defendant*

W. F. Williamson, Williamson & Wallace, 310 Sansome Street, San Francisco, California, Attorneys for Plaintiff.

Robert L. Pierce, Special Assistant to the Attorney-General, Washington, D. C.; Frank J. Hennessy, United States Attorney, San Francisco, California; Attorneys for Defendant.

Daniel W. Knowlton, Washington, D. C., Attorney for Intervenor Interstate Commerce Commission.

W. S. Hefferan, Jr., Kenneth F. Burgess, Douglas F. Smith, Chicago, Illinois; Allan P. Matthew, Burnham Enersen, Balfour Building, San Francisco, California, Attorneys for General American Transportation Corporation, Intervenor.

J. Carter Fort, Guernsey Orcutt, C. A. Miller, Charles Clark, J. E. Hennessy, R. E. Wedekind, R. S. Outlaw, Starr Thomas, 114 Sansome Street, San Francisco, California, Attorneys for The Alabama Great Southern Railroad Company, et al., Intervenors.

Opinion

Before Honorable Curtis D. Wilbur, United States Circuit Judge; Honorable A. F. St. Sure, United States District Judge; Honorable Louis E. Goodman, United States District Judge.

GOODMAN, *District Judge:*

Plaintiff's bill of complaint, by which this three judge Court is asked to annul and vacate a decision of the Interstate Commerce Commission, culminates a long process of litigation.

In 1933, plaintiff, a processor of cocoanut oil, contracted with General American Transportation Corporation, owner of private tank cars, to rent a fixed number of the latter's tank cars at a stipulated monthly sum per car. By the agreement, the tank car company agreed to pay over to plaintiff the excess, if any, of the mileage income it received from railroad carriers over and above the stipulated monthly rental to be paid to it by plaintiff.

This agreement the tank car company performed until the following year, when the Interstate Commerce Commission, in a proceeding pending before it involving refrigerator cars, ruled payments of this kind to be improper. (Use of Privately Owned Refrigerator Cars, 201 I. C. C. 323-378.) Thereafter the tank car company refused to make any further such payments to plaintiff. Thereupon the plaintiff filed an action in assumpsit in this court to recover the sum of $18,532.78 alleged to be the amount of the accumulated payments due it. Judgment in favor of the defendant in that case was reversed by the Circuit Court of Appeals (104 Fed. (2d) 903, 9th Cir.)

The Supreme Court took over the cause on certiorari and reversed the Circuit Court of Appeals (General American Tank Car Corp. v. El Dorado Terminal Co. 308 U. S. 422) holding that the District Court should have stayed proceedings "when it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved" and "should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act." (i.e. Interstate Commerce Act.)

In so holding, the Supreme Court followed a like procedure which it earlier had invoked in Mitchell Coal & Coke Co. v. Penna. R. R. Co. 230 U. S. 247.

Thereafter, following a petition filed with the Interstate Commerce Commission by the plaintiff, the Commission in-

stituted and conducted an investigation upon the subject matter of the practice followed by plaintiff and the tank car company pursuant to the agreement between them.

After hearings, in which the plaintiff, the tank car company and numerous railroad carriers participated, the Commission made a determination whereby it decided in effect that the car rental paid by the plaintiff to the tank car company represented the plaintiff's only cost in furnishing the tank cars in which its (plaintiff's) shipments moved, and that any allowances, by the tank car company to the plaintiff pursuant to the agreement between them in excess thereof, were unjust and unreasonable and constituted an unlawful preference or rebate to plaintiff as shipper, contrary to the Elkins Act. After making the finding and determination aforesaid the Commission discontinued the proceeding.

Plaintiff now seeks to have this three judge court vacate and annul the decision of the Interstate Commerce Commission, urging that the same is not supported by the evidence before the Commission. The cause was submitted upon a certified copy of the proceedings before the Interstate Commerce Commission.

Defendant and intervenors urge that the three judge court lacks jurisdiction of the subject matter and that, on the merits, the record supports the finding and decision of the Interstate Commerce Commission.

We do not pass upon the merits of the cause inasmuch as we are of the opinion that this court, as constituted pursuant to the "Urgent Deficiencies Act" (38 Stat. 219; 28 U. S. C. Sec. 41 (28); Sec. 43-48), lacks jurisdiction of the subject matter.

By the Urgent Deficiencies Act the jurisdiction conferred on three judge district courts is in "cases brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission." By its finding and determination with respect to the practice here involved, the Interstate Commerce Commission made no decision which required any party to the proceeding before it to do or not to do any specific act. It followed the directions of the Supreme Court (General American Tank

Car Corp. v. El Dorado Terminal Co., supra) and determined, under the Interstate Commerce Act, the lawfulness and reasonableness of the practice which had obtained between plaintiff and the tank car company. When this was done, its job was done. It was not required to make any order and made none, and having completed its work, stamped "finis" thereon and discontinued the proceeding. Hence there is no order, in the sense contemplated in the statute, requiring review by this court. (U. S. v. Griffin, 303 U. S. 226, 233; U. S. v. Ill. Central R. R. Co. 244 U. S. 82; D. & H. Co. v. U. S. 266 U. S. 438; U. S. v. L. A. Ry. Co. 273 U. S. 299.)

Past transactions between plaintiff and defendant constitute the subject matter of the assumpsit action now pending in the District court. This is not a case of a presently existing practice declared unlawful by the Commission. Consequently there does not arise the right to apply for the equitable or injunctive relief provided by the statute to protect against irreparable damage.

The procedure specified by the Supreme Court in General American Tank Car Corp. v. El Dorado Terminal Co. supra, has been followed. The administrative practice involved has been passed upon by the Interstate Commerce Commission. The parties may now proceed in the assumpsit action. Therein, in our opinion, the court may determine plaintiff's cause and upon tender thereof, any competent defenses thereto.

The action will be dismissed with costs to defendant and intervenors. Counsel for defendant may submit findings of fact and conclusions of law in conformity with Rule 52-A F. R. C. P.

Dated: March 6, 1945.

(Endorsed:) Filed Mar 7 1945, C. W. Calbreath, Clerk.

APPENDIX "C"

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Civil Action No. 23619-G

EL DORADO OIL WORKS, a Corporation, and EL DORADO TERMINAL COMPANY, a Corporation, *Plaintiffs*,

vs.

UNITED STATES OF AMERICA, *Defendant*, and INTERSTATE COMMERCE COMMISSION, *Intervening Defendant*.

Findings of Fact and Conclusions of Law

The court makes the following findings of fact:

1. The El Dorado Oil Works is a California corporation engaged in crushing copra and extracting cocoanut oil therefrom in plants at Berkeley and Oakland, Calif., and shipping the product in tank cars in interstate commerce.

2. The El Dorado Terminal Company, a wholly owned subsidiary of the Oil Works Company, is also a California corporation, and during the times here involved it performed services for the Oil Works in the handling and shipping of its commodities.

3. The General American Tank Car Corporation, throughout the transactions hereinafter recited had its principal office at Chicago, Ill., and was the owner of numerous railway cars, including tank cars, which it furnished to various shippers for the transportation of their commodities. It was not affiliated with any railroad company by stock ownership or otherwise.

4. On September 28, 1933, the Oil Works entered into a written agreement with the Tank Car Corporation for the lease to the Oil Works during the period beginning January 1, 1934, and ending December 31, 1936, of 50 standard tank cars, referred to as permanent cars, at a rental of $27.50 per

month, and for such further number of tank cars as the Oil Works should require at a rental of $30 per month, the Oil Works agreeing, insofar as it could lawfully do so, to use the Tank Car Corporation's cars exclusively. The agreement provided, among other things, that the Tank Car Corporation should collect from rail carriers all mileage earned by the leased cars while in the service of the Oil Works and each month should credit the entire earnings to the rental account of the Oil Works. Pursuant to this agreement the Tank Car Corporation assembled and delivered the tank cars to the Oil Corporation. The Oil Corporation loaded the cars and delivered them to the carriers for transportation. The Tank Car Corporation as the owner of the cars involved collected from the railroads rental for the use of the cars, based on an allowance per mile for the distance for which they were used according to the tariffs filed by the railroads as required by law, but such tariffs did not provide for the payment of an allowance to the owner of the property transported from the plant of the Oil Works by reason of the furnishing of the tank cars therefor by the Oil Works as shipper-owner.

5. During the period from January 1 to July 1, 1934, the Tank Car Corporation paid over to the Oil Works mileage earnings of $7,219.54 in excess of the rental due from the Oil Works. After the latter date, assuming that such action would be necessary to comply with the principles enunciated by the Interstate Commerce Commission in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, decided July 2, 1934, the Tank Car Corporation refused to pay over to the Oil Works any further excess mileage earnings, notwithstanding the terms of the lease agreement.

6. In June 1935, the Terminal Company, as assignee of its parent company, the Oil Works, sued the Tank Car Corporation in the United States District for the Northern District of California to recover unpaid excess mileage earnings which had accrued from the use of the leased cars up to May 31, 1935. The amount sued for, according to evidence of record, was for the difference between the rentals credited by the Tank Car Corporation to the Oil Works and the total amount of mileage earnings of the leased cars

received by the Tank Car Corporation from the carriers, during the period from January 1, 1934, to May 31, 1935, and amounts to $23,540.79. Judgment for the Tank Car Corporation was rendered by the district court, but was reversed on appeal by the circuit court of appeals, 104 Fed. (2d) 903, 916, which held the Oil Company was entitled to the full amount claimed. The Supreme Court granted certiorari.

7. Subsequently, in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, the Supreme Court held that the "reasonableness and legality of the practices of the parties was subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission," and that "when it appeared in the course of the litigation that an administrative problem, committed to the Commission was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act." The judgment of the circuit court of appeals was reversed and the cause remanded to the district court to be there held "pending the conclusion of an appropriate administrative proceeding" by the Commission.

8. There is also pending in the district court a second suit by the Oil Works for the recovery of unpaid excess mileage earnings which accrued between May 31, 1935, and the expiration of the contract, December 31, 1936.

9. Following the decision of the Supreme Court, the Oil Works and the Terminal Company on June 7, 1940, jointly petitioned the Interstate Commerce Commission to cause an investigation to be made of the practices disclosed by the action referred to and in the opinion of the United States Supreme Court. Upon consideration of that petition, by order dated July 24, 1940, the Interstate Commerce Commission instituted an investigation upon its own motion to determine:

> (1) whether the practices involved under the terms and operations of the lease contract are unlawful in violation of the Interstate Commerce Act;

(2) whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid, by the carrier or carriers by railroads for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate commerce from Berkeley and Oakland, Calif.; in the period January 1, 1934 to December 31, 1936; and

(3) what findings shall be made, or what rules, regulations, or practices shall be prescribed, or what orders shall be entered, to remove any unlawfulness that may be found to exist.

10. After hearing, in which the plaintiff, the tank car company, and numerous railroad carriers participated, the Commission made a determination whereby it decided in effect that the car rental paid by the plaintiff to the tank car company represented the plaintiff's only cost in furnishing the tank cars in which its (plaintiff's) shipments moved, and that any allowances, by the tank car company to the plaintiff pursuant to the agreement between them in excess thereof, were unjust and unreasonable and constituted an unlawful preference or rebate to plaintiff as shipper, contrary to the Elkins Act. After making the finding and determination aforesaid the Commission discontinued the proceeding. (258 I. C. C. 371).

11. Plaintiff filed this bill in this court, consisting of three judges under the Urgent Deficiencies Act of October 22, 1913, seeking to have the court vacate and annul the decision of the Interstate Commerce Commission, urging that the same is not supported by the evidence before the Commission. The cause was submitted upon a certified copy of the proceedings before the Interstate Commerce Commission.

12. Defendant and intervenors urge that the three judge court lacks jurisdiction of the subject matter and that, on the merits, the record supports the finding and decision of the Interstate Commerce Commission.

The Court makes the following conclusion of law:

1. The court has no jurisdiction of this suit, as the only jurisdiction it has is to set aside an "order" of the Inter-

state Commerce Commission, and there is no order involved here.

2. The action is dismissed with costs to defendant and intervening defendants.

CURTIS D. WILBUR,
United States Circuit Judge;
A. F. ST. SURE,
United States District Judge;
LOUIS E. GOODMAN,
United States District Judge.

Dated: March 28th, 1945.

(Endorsed:) Lodged March 21, 1945. C. W. Calbreath, Clerk. Filed Apr. 9, 1945. C. W. Calbreath, Clerk.

APPENDIX "D"

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Civil Action. No. 23619-G

ELDORADO OIL WORKS, a Corporation, and EL DORADO TERMINAL COMPANY, a Corporation, *Plaintiffs,*

vs.

UNITED STATES OF AMERICA, *Defendant,*

and

INTERSTATE COMMERCE COMMISSION, *Intervening Defendant.*

Final Decree

This cause having come on to be heard on complaint, answers to complaint, and proofs, and having been argued by counsel before the specially-constituted District Court convened pursuant to the provisions of law, and thereupon,

upon consideration thereof, it was determined, ordered, adjudged and decreed as follows:

The relief prayed for in the complaint is hereby denied and the complaint is dismissed at plaintiff's costs, for want of jurisdiction.

CURTIS D. WILBUR,
United States Circuit Judge;
A. F. ST. SURE,
United States District Judge;
LOUIS E. GOODMAN,
United States District Judge.

March 28th, 1945.

(Endorsed:) Lodged March 22, 1945. C. W. Calbreath, Clerk. Filed Apr. 9, 1945. C. W. Calbreath, Clerk.

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